STATE OF MICHIGAN

COURT OF APPEALS

DONA HIAR,

Plaintiff-Appellant,

v

BOB STRONG, STRONG LANDSCAPING & EXCAVATING, INC., and THE TOWNSHIP OF BLISS,

Defendants-Appellees.

UNPUBLISHED
March 16, 2006

No. 257918
Emmet Circuit Court
LC No. 03-007699-NO

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part.

This case stems from plaintiff's fall into a trench at a cemetery owned by defendant township. The trench was dug by defendant Robert Strong, through his business,[1] at the direction of defendant Bliss Township, in order to move a burial vault from one location to another. The circuit court concluded that the hole into which plaintiff fell was an open and obvious danger and that there were no special circumstances that made the risk presented unreasonably dangerous.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law" MCR 2.116(C)(10). When deciding a (C)(10) motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "A genuine issue of material fact

[1] Strong testified that Strong's Landscaping & Excavating does not exist as a corporation. Rather, he claims that he just painted the logo on his truck.

exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The duty a land or premises owner owes a visitor who enters on his land depends on the visitor's status: trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). In *Stitt*, the Court declined to adopt § 332 of the Restatement of Torts, 2d, which recognized a public invitee as an invitee. *Id.* at 603-604. Instead, *Stitt* held that in "order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose." *Id.* at 604 (emphasis in original). In this case, plaintiff was not visiting the cemetery for a commercial purpose. Therefore, plaintiff was a licensee at the time of the accident. Plaintiff acknowledges that *Stitt* is controlling.

The duty of care owed to a licensee is to "warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit." *Id.* at 596. Additionally, a possessor of land has no obligation to take any steps to safeguard licensees from conditions that are open and obvious. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001).

> A possessor of land has no duty to give warning of dangers that are open and obvious, inasmuch as such dangers come with their own warning. Where there is a duty to a visitor to make a condition safe (i.e., the duty to an invitee), potential liability will remain for harm from conditions that are unreasonably dangerous despite their open and obvious nature. *Bertrand* [*v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995)], *supra* at 611. However, with regard to licensees, no liability arises if the licensee knows or has reason to know of the danger, or if the possessor should expect that the licensee will discover the danger. *Wymer v Holmes*, 429 Mich 66, 71; 412 NW2d 213 (1987). Hence, a possessor of land has no obligation to take any steps to safeguard licensees from conditions that are open and obvious. See *Haas v Ionia*, 214 Mich App 361, 362; 543 NW2d 21 (1995) (the "open and obvious" danger principle establishes awareness and thus ability to avoid the danger). [*Pippen*, 245 Mich App at 143].

This Court uses an objective test to decide whether a condition is open and obvious. The relevant question is "whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). "Because the test is objective, this Court 'look[s] not to whether plaintiff should have known that the [condition] . . . was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Hughes, supra* at 11.

In her brief on appeal, plaintiff argues that the court erred in employing a subjective test instead of an objective test when deciding the open and obvious question. At argument, however, plaintiff asserted that the court erred in applying an objective test, instead of focusing on whether this particular plaintiff knew or should have known of the hazard. We construe the court's decision as having correctly identified and applied the objective test. Plaintiff's deposition testimony was only referenced to set forth the particular relevant features of the

environment. The average person making a casual inspection of the area would have noticed the large hole in the ground and the danger presented.

Plaintiff next argues that the circuit court erred in concluding that there were no special aspects of the condition that made the open and obvious risk unreasonably dangerous. We agree that a six-foot-deep trench may indeed present an unreasonably dangerous risk to an invitee. However, plaintiff was a licensee. Defendant township is subject to liability to a licensee for injury caused by a condition presenting an unreasonable risk of harm only if it should have expected that the licensee would not discover or realize the danger and if the licensee did not know or have reason to know of the condition and the risk involved. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 64-65; 680 NW2d 50 (2004) (quoting *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970), quoting 2 Restatement Torts (2d) § 342, p 210.) Here, there was no genuine issue of material fact regarding whether defendant township should have expected that plaintiff would not discover the trench and realize the danger, or whether plaintiff should have known of the danger. Summary disposition was properly granted to defendant township.[2]

Finally, plaintiff argues that the circuit court committed error requiring reversal when it applied the open and obvious doctrine to Strong who does not own or possess the land where the injury occurred. We agree. It is well established, "that '[p]remises liability is conditioned upon the presence of both possession and control over the land.'" *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998), quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). There is no dispute that Bliss Township, and not Strong, owns and possesses the cemetery where plaintiff's injury occurred. As a result, the open and obvious doctrine does not apply to defendant Strong and his business.

Defendant Strong argues that because he is the sexton of the cemetery and dug the trench as defendant township's agent, qualified governmental immunity shields him from liability. The circuit court did not address this issue, and the record is insufficient for us to do so on appeal. It is unclear whether Strong dug the trench in his capacity as sexton or pursuant to contract with his company, and whether he did so as defendant township's agent, or as agent for the funeral home or grave owner.

Affirmed as to defendant township, and reversed and remanded for further proceedings as to the Strong defendants. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter

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[2] Although not addressed below, we note that defendant's alternative basis for affirmance based on governmental immunity supports the circuit court's decision as to defendant township as well.